UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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IN RE:	CASE NO.: 17-40583-cec
Wanda Conti,	CHAPTER 11
Debtor.	Chief Judge: Hon. Carla E. Craig

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AFFIRMATION IN SUPPORT OF US TRUSTEE'S MOTION TO DISMISS WITH PREJUDICE FOR A PERIOD OF TWO YEARS

Karen Sheehan, an attorney admitted to practice law, in the courts of the State of New York and in this Court, hereby affirms the following to be true under penalty of perjury:

1. I am an associate with Frenkel, Lambert, Weiss, Weisman & Gordon, LLP, attorneys for AS Arete LLC (hereinafter "AS Arete"), a secured creditor of the Debtor, relative to real property located at 21111 Bella Vista Circle, Boca Raton, Florida. I am fully familiar with the facts of this case and submit this affirmation in support of the United States Trustee's motion seeking dismissal of the chapter 11 case with prejudice for two years, or in the alternative converting the chapter 11 case to a chapter 7, pursuant to 11 U.S.C. §1112(b) and §105(a).

STATEMENT OF FACTS

2. On January 15, 2015, the Debtor filed a Chapter 11 bankruptcy petition, under case No. 15-40163 ("First Bankruptcy Case"). The First Bankruptcy Case was dismissed as a result of the Debtor's inability to effectuate substantial consummation of a confirmed plan. The case was dismissed by Order entered October 27, 2016.

3. On October 28, 2016, the Debtor filed a chapter 13 bankruptcy petition under case No. 16-44583 ("Second Bankruptcy Petition"). The filed petition did not include all requisite

schedules and the Second Bankruptcy Case was dismissed pursuant to 11 U.S.C. §521 on December 13, 2016.

4. The Debtor filed the instant bankruptcy petition on February 9, 2017 ("Third Bankruptcy Case"). Since the Debtor had two bankruptcy cases dismissed in the previous year, pursuant to 11 U.S.C. §362 (c)(4)(a)(i), the automatic stay did not go into effect upon the filing of this Third Bankruptcy Case.

5. The Debtor filed a bare bones petition without any schedules or other required information. On February 22, 2017, the Debtor filed a motion seeking to extend the deadline to file her schedules. The Debtor's motion to extend time to file her schedules was denied by Order dated February 28, 2017 and the Debtor was directed to file all schedules by March 1, 2017.

6. On February 24, 2017, the Debtor filed a motion seeking to impose the stay pursuant to 11 U.S.C Section §362 (c)(4)B). It appears from the docket that this motion was marked off on April 5, 2017.

7. On March 1, 2017, Debtor's counsel filed a letter indicating that he has "been literally begging" the Debtor to come to his office to provide him with the requisite information to file her schedules. However, the Debtor has not cooperated with her attorney.

8. On April 4, 2017, the Debtor's counsel filed a motion seeking to be relieved as counsel for the Debtor. Counsel's motion to be relieved is replete with an extensive history of his attempt to garner the Debtor's cooperation in her own bankruptcy case. However, as indicated therein, the Debtor is not cooperating with her attorney.

9. The Court may recall that this is not the first time the Debtor failed to cooperate with her attorney. In the First Bankruptcy Case, the Debtor failed to cooperate with her attorney in much the same way that she is failing to cooperate with her present attorney. On January 8, 2016, her

attorney in the First Bankruptcy Case sought to be removed as counsel. (See ECF No. 86 in Case No. 15-40163). See attached application dated 1/8/2016 annexed hereto as **Exhibit A.**

10. The Court may recall that this is also not the first time that the Debtor failed to comply with an Order of the Court. In the First Bankrputcy Case, on November 5, 2015, this Court entered an Order directing Wanda Conti and her daughter Lori Conti to grant access to the Property. Due to their failure to comply with the Order, Movant was forced to file a motion for contempt for violation of the Court's Order. The Court awarded attorney's fees to Movant in connection with the Debtor's willful refusal to grant access to the Property.

ARGUMENT

11. According to the U.S. Trustee's motion, the Debtor has failed to provide them with the basis items necessary to proceed with her bankruptcy case, including:

a. Proof of insurance on real property

b. Proof that she has opened debtor in possession accounts, and

c. She failed to file the schedules, in direct violation of this Court's Order dated February 28, 2017.

12 It should be noted that AS Arete owns the Note and Mortgage on real property located at 21111 Bella Vista Circle, Boca Raton, Florida. Since there have not been any schedules filed to date, this property does not even appear to be known to the U.S. Trustee's office.

A. Dismissal Pursuant to 11.U.S.C. §1112(b)

13. Bankruptcy Code Section 1112(b)(1) provides in part that "on request of a party in interest, and after notice and a hearing . . . the court shall convert . . . or dismiss a case under [Chapter 11], whichever is in the best interests of the creditors . . . for cause."

14. The requirement that a debtor file a case under Chapter 11 in good faith is implicit in Bankruptcy Code Section 1112(b), and "'it is well established that bad faith may serve as a ground for dismissal of a bankruptcy petition.'" In re GEL, LLC, 495 B.R. 240, 246 (Bankr. E.D.N.Y. 2012) (quoting In re Island Helicopters, Inc., 211 B.R. 453, 461 (Bankr. E.D.N.Y. 1997)). As one Court of Appeals has observed, "a good faith filing requirement is implicit in several specific provisions of the bankruptcy code, interpreted in light of established policy considerations underlying the code's provision of bankruptcy protection." Carolin Corp. v. Miller, 886 F.2d 693, 698 (4th Cir. 1989).

15. While the term "cause" is not defined by the statute, Section 1112(b)(4) of the Bankruptcy Code provides several non-exclusive examples, any one of which may constitute "cause," for either the conversion of a Chapter 11 case to a Chapter 7 case or the dismissal of a Chapter 11 case in its entirety.

16. The burden of showing cause rests with the moving party, In re Loco Realty Corp., No. 09-11785(AJG), 2009 WL 2883050, at *2 (Bankr. S.D.N.Y. June 25, 2009), and that burden can be met either by demonstrating the existence of one or more of the statutory grounds enumerated in Section 1112(b) or by showing other cause. See 11 U.S.C. §1112(b)(4); In re State St. Assocs., L.P., 348 B.R. 627, 638 (Bankr. N.D.N.Y. 2006) (while the list of examples of "cause" has changed in the 2005 amendment, the fact that they are illustrative, not exhaustive, has not); see also In re Strawbridge, No. 09-17208 (MG), 2010 WL 779267 at *3 (Bankr. S.D.N.Y. March 5, 2010); In re Loco Realty, No. 09-11785 (AJG), 2009 WL 2883050 at *2; In re Ameribuild Constr. Mgmt., 399 B.R. 129, 131 (Bankr. S.D.N.Y. 2009).

17. Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), a lack of good faith in filing a chapter 11 case constituted

cause to dismiss a case under Section 1112(b) of the Bankruptcy Code. See C-TC 9th Ave. P'ship, 113 F.3d 1304 (2d Cir. 1997). The same standard applies post-BAPCPA. See In re Strawbridge, 2010 WL 779267 at *3; In re Loco Realty, 2009 WL 2883050 at *2. See In re Ameribuild Const. Management, Inc., 399 B.R. at 132.

18. The Debtor's failure to provide the basic necessities of her case, including proof of insurance, complying with the Court's February 28, 2017 Order, filing her schedules, providing proof of Debtor in possession accounts and cooperating with her attorney are grounds for dismissal of under 1112(b)(4)(H). As stated in the Trustee's motion, there are no unusual circumstances in this case which would establish that dismissal is not in the best interests of the creditors and the estate.

B. Debtor Is Acting in Bad Faith/Two Year Prejudice should be granted

19. Bad faith is present where, under the "totality of the circumstances," maintaining a Chapter 11 reorganization case is not the "proper course of action," In re Fraternal Composite Serv, Inc., 315 B.R. 247, 249 (Bankr. N.D.N.Y. 2003). A determination as to the good faith of a bankruptcy filing requires an inquiry into any possible abuses of the provisions, purposes, or spirit of bankruptcy law and into whether the debtor genuinely needs the liberal protections afforded by the Bankruptcy Code. See In re Setzer, 47 B.R. 340 (Bankr. E.D.N.Y. 1985); see also In re Loco Realty Corp., 2009 WL 2883050, at *2 (noting that good faith "is required to prevent fraud or abuse of the bankruptcy process.").

20. Indeed, "[w]here the primary purpose of the filing of a Chapter 11 case is as a litigation tactic, the petition may be dismissed for lack of good faith." In re C-TC 9th Ave. P'ship, 193 B.R. 650, 654 (Bankr. N.D.N.Y. 1995).

21. In light of the Debtor's dubious actions, the bankruptcy petition should be dismissed pursuant to 11 U.S.C. 1112(b)(1) and 11 U.S.C. §105(a) for cause with prejudice for a period of two years.

22. Pursuant to §362(c)(4)(i) and (ii)(B), the presumption is that the Debtor's case was filed in bad faith. The Debtor has the burden of proving that her case was filed in good faith. The Debtor has not demonstrated any change in circumstances, let alone a substantial change in circumstances in her financial or personal affairs which would demonstrate good faith. The Debtor's serial filings, separated by mere weeks, in conjunction with her willful failure to participate in her cases demonstrates bad faith. The Debtors actions show that she is using the bankruptcy code to delay and prejudice her creditors. If this case is not dismissed with prejudice, the Debtor will undoubtedly commence another bankruptcy case on the eve of any adverse action taken by one of her creditors.

WHEREFORE, AS Arete respectfully requests an Order for relief in the alternative as requested herein and for such other and further relief as is just and proper.

Dated: Bay Shore, New York
May 2, 2017

Respectfully submitted,

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